1439.[41] As shown in these Comments, these entries will require advance definition, preparation and training within carrier operations for an interim and questionable benefit. True antitrust litigation costs are diminishing in nature, although periodic spurious claims are made, and the Commission will be imposing a regimen on carriers that business reality does not justify.

IV. THE COMMISSION SHOULD REASSESS THE MATTER OF SETTLEMENTS AND RESPOND TO THE REALITY THAT OTHER FACTORS WILL COME INTO PLAY THAT DRIVE THE SETTLEMENT OF LITIGATION OTHER THAN POTENTIAL LIABILITY AND NUISANCE VALUE.

Rather than pursue a multiyear holding pattern for all antitrust litigation costs, the Commission should maintain the prevailing scheme, a scheme that tests costs against a reasonableness standard in light of the facts. A reasonableness standard would permit the Commission in the antitrust context to weigh the relevant criteria deemed significant in the NPRM and by the Litton Costs and Antitrust Rules decisions.

The matter of settlements poses continuing problems in this proceeding, as it did in the last proceeding, because there are many reasons for defendant litigants to settle that are unrelated to imminent or other liability or cost. The Commission must reflect in any rule the reality of litigation.

[41] NPRM at ¶ 8.

Otherwise, its rule will operate against the public interest, and will create incentives for adversaries either to initiate or continue litigation using the Commission's rules as a bargaining chip, or to pursue types of claims that they anticipate will force the carrier to deal with them on more favorable terms, regardless of the merits of a case. While the Commission seeks to avoid carrier costs, the promotion of litigation can lead to additional costs and business disadvantage to carriers. [42]

The decision to settle a piece of litigation is a balancing act among a number of factors. These factors could include monetary exposure (not necessarily related to the likelihood of liability); the ability to pay (certainly a factor for small carriers, if not for all carriers); the likelihood of additional expense for document development, discovery, witness issues, trial preparation, travel, and the like; the desire for peace and finality because of unrelated factors (such as the ability of the company and its employees to focus on new business ventures and future strategies); the

[42] That it is additional relative expense for the owners of the common carrier is a fact. Nonregulated entities are able to spread their litigation costs among the products and services that they sell, regardless of the nature of the litigation. The owners of these businesses, then, do not normally face any out-of-pocket cost themselves. The Commission's rule would drive the cost of covered litigation entirely away from the comparable products and services of carriers, and payment would be derived solely from the shareholders. This difference skews bargaining power in resolving litigation and ultimately affects the position of the carriers in the marketplace.

availability or unavailability of key documents or witnesses; the difficulties of proof; the skill of counsel; the pressures by the trier-of-fact; the impact on a company's public image; the broader principles involved; and, of course the comparable assessments and willingness of parties on the other side. Some settlements are agreed to reluctantly, despite a strong desire for vindication. Settlements themselves are prudently made, but not because of nuisance value considerations. The Commission has never addressed these other factors, concluding that settlement costs are simply a function of anticipated liability. The Commission either has to address these factors, or allow carriers to provide a reasonableness showing of the considerations that came into play and that drove a settlement.

V. THE COMMISSION SHOULD RECOGNIZE THAT THE EXPENSES OF DEFENDING ANTITRUST LITIGATION PRIOR TO A DECISION ON THE MERITS OR PRIOR TO SETTLEMENT SHOULD BE DISTINGUISHED FROM OTHER COSTS INVOLVED IN SUCH LITIGATION.

The Commission has not recognized the issue of litigation expenses insofar as it involves costs incurred prior to a decision or settlement by the carrier itself. Early on in this proceeding, the Commission misread the core case upon which it relied, NAACP v. FPC.[43] The court in the Litton Costs appeal made it clear that the attorneys' fees expenses addressed in NAACP were not the same as those incurred in defending

[43] NAACP v. Federal Power Commission, 425 U.S. 662, 48 L.Ed. 2d 284 (1976).

litigation, and that the NAACP characterization of expenses, i.e., fees incurred by a plaintiff's lawyer to pursue a claim, were by statute deemed awardable as part of the ultimate damages in NAACP-type discrimination cases.[44] The Commission "came belatedly to the realization that the (NAACP) court was addressing expenses and costs different from those at issue in the Litton Order."[45] It was only at that point that the Commission attempted to revive its rationale on policy grounds.[46] The discussion above (at pages 6-8), related to a "black and white" contamination of all antecedent expenses involved in litigation, addresses the policy concerns of defense costs. In short, the law condemns such a precipitous result.

The NPRM relies on a statement in the Litigation Rules decision that recovery of litigation costs would force ratepayers to subsidize illegal conduct.[47] However, the test for prudence is a "real time" test. It is inappropriate for regulators to engage in after the fact second-guessing of

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[44] Such costs are "the product of a regulatee's discriminatory employment practices" only because a plaintiff has to incur them to obtain redress, and Congress wanted the plaintiff to have the opportunity to be made whole. See Litton Costs decision, 939 F.2d at 1021. The regulatee's own defense costs are not reflected in the NAACP analysis. It was the Commission that read the language this way.

[45] Litton Costs decision, 939 F.2d at 1021.

[46] Id.

[47] NPRM at ¶ 16.

expenses incurred by carriers in defending claims against them.[48] USTA respectfully disagrees that the Litigation Rules decision itself approves of the contamination theory espoused in the prior version of these rules. As the court did not find it necessary to focus on that part of the Commission's decision, its analysis and vacation of the new rules in their entirety speaks for itself - the Commission's rationale and decisionmaking detail failed the legal test. The court did not vacate only part of the new rules, but all of them. If a carrier retains a real opportunity, as a practical matter, to show the reasonableness of those costs, a rule may be sustainable.[49] An illusory option is not.

VI. THE LIKELY COSTS OF COMPLYING WITH THE PROPOSED RULES ARE ENORMOUS.

If the Commission adopts rules dealing with litigation costs, it will cause the institutionalization of new costs far in excess of the speculative benefits that it suggests are possible. The preexisting procedure has proved to be reliable.[50] An examination of the procedure that will face

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[48] Prudence must be determined from the circumstances at the time of carrier action, not from hindsight. Parke Towne v. PUC, 433 A.2d 610, 618 (Pa.Commw. 1981); Bonbright, Principles of Public Utility Rates 174, note 2 (1961).

[49] Litigation Costs decision, 939 F.2d at 1046.

[50] The Commission found, as far back as 1982, that "The Commission already possesses means under existing rules to adequately meet any need for data as to a carrier's litigation expenses on an ad hoc basis," pursuant to sections 215, 218, 220 and 403 of the Communications Act. Memorandum Opinion and Order, Litigation Expenses, CC Docket No. 79-19, 92 FCC 2d 140, 145

every affected carrier is enlightening. This discussion identifies only the most obvious direct costs.

Every complaint filed against a carrier will have to be scrutinized to determine whether it will come within the accounting rules adopted. If it comes within the scope of the rule eventually adopted, a system will be needed to identify the relevant costs of a defense, and to separate them for accounting purposes. Regardless of the merits or motivations of a complaint, these steps will have to be followed. In addition, all of the litigation costs of a multifaceted complaint will have to be segregated, even if the triggering claim is a frivolous or completely unsubstantiated one, and it is later effectively abandoned in the course of discovery. The Commission has made no accommodation for early resolution of these claims, or for settlements that are partial, and that will erase the risk of liability under the triggering claim (even if others remain), or that will resolve the matter against some but not all litigants.[51]

(1982).

[51] The law routinely accepts apportionment of liability and related methods to compare culpability or responsibility across multiple parties, whether they are plaintiffs or defendants. The Commission's proposed rule is completely at odds with this important characteristic of today's litigation environment, a characteristic that is bred into the public policy fabric of both federal and state statutory and common law. The proposed rule fails to accommodate these comparative responsibility measures, and will deter carrier litigants from seeking early disposition of cases in multiple defendant situations because the Commission will continue to hold a carrier responsible for all of the

As the Commission saw in the Alascom matter, a host of previously unanticipated considerations came into play, all of which will require advance memorialization and later proceedings to determine whether and how they fit the new rules. As among counsel - typically outside counsel who may be unfamiliar with established carrier accounting practices and procedures - a new learning process may have to be developed for each case. These requirements appear to be expected for every covered complaint, and every complaint will have to be individually addressed. These matters will require new expertise, and cannot easily be resolved by untrained employees. These concerns appear to be exactly the efficiency and incentive concerns that the Litigation Rules court saw as defeating the reasonableness of the last iteration of this rule.[52] Accounting should follow the business, not drive it.

This analysis also illustrates that any new rules adopted by the Commission can achieve even a minimal cost-benefit result only by avoiding the need for such procedures in cases where the amount at risk is not material to the carrier's rates or other obligations. The Commission should never require matters with de minimis exposure to be tracked in any new rules. Further, a carrier that typically needs an adjustment

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eventual expense it incurs, rather than reducing it proportionately as is done in other areas of the law.

[52] Litigation Rules decision, 939 F.2d at 1045-46.

of, e.g., $100 million in expense to affect its refund or sharing liability should not have to track cases that are any smaller than that.

VII. ANY RULE ADDRESSING LITIGATION OTHER THAN SUBSTANTIAL ANTITRUST LITIGATION IS UNWARRANTED.

A central defect of the Commission's rules in the Litigation Rules decision lay in the Commission's derivative and cavalier extension of its analysis to other federal statutes.[53] USTA opposes any rule that seeks to cover a range of statutes, none of which are shown to have a policy basis that demands a Part 32 rule.

As the Commission will see again in this proceeding, there are no justifiable ways to draw boundaries and to identify a basis for including some statutes and not others. The Commission's rationale for not extending rules to common law situations[54] is equally applicable to statutory litigation, including all statutory litigation other than antitrust litigation. The Commission lacks the ability and the resources to determine, for example, whether the level of preservative historically used in telephone poles should be viewed as environmentally appropriate in the future, whether a carrier's decisions among alternative ways to dispose of lead cable sheathing are prudent, or whether choices among alternative

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[53] Litigation Rules decision, 939 F.2d at 1044-46.

[54] NPRM at ¶ 22-23.

methods to notify customers of rules contemplated by other agencies are cost effective in light of the requirements eventually adopted. All of these have been real situations confronted by both exchange and interexchange carriers in the past 18 months.

VIII. CONCLUSION.

The Commission should reconsider its NPRM proposals, reconcile the two decisions that control the law here, and seek out options that do not waste the time or resources of carriers or the Commission staff. The best alternative is no rule, with the Commission reserving the right to address accounting practices of carriers when a litigation situation of sufficient magnitude requires it. Thereafter, it can address costs as a matter of reasonableness.

Respectfully submitted,

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